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December 21, 1978

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ARIZONA ATTORNEY GENERAL

Honorable Morris Farr
Arizona State Senator
State Capitol, Senate Wing
Phoenix, Arizona 85007

Re: I78- 285 (R78-121)

Dear Senator Farr:

You have requested our opinion with respect to whether a meeting of the Board of Regents held on April 24, 1978 was conducted in compliance with Arizona's Open Meetings Law. (A.R.S. § 38-431 et seq.)¹ We regret the delay in responding to your request; however, since your letter did not describe the circumstances surrounding that meeting we have had to make an independent inquiry to determine the relevant facts.

We have been informed by Blair Benjamin, Advisor to the Board of Regents, that the meeting on April 24, 1978 was not a meeting of the Board of Regents but rather a meeting of the Finance Committee of the Board. We are informed that the Finance Committee is a Committee appointed by the Board and is comprised of all of the members of the Board of Regents with the exception of the Board's ex-officio members (the Governor and the Superintendent of Public Instruction). The purpose of the Finance Committee is to make recommendations to the full Board on financial matters such as tuition fees. In our opinion the Finance Committee is a "governing body" as that term is defined in A.R.S. § 38-431 and is therefore subject to the Open Meetings Law. See Atty.Gen.Op. 77-109. See also Greene v. Athletic Council of Iowa State University, 251 N.W.2d 559 (Iowa 1977).

¹A.R.S. § 38-431 et seq. was amended effective September 3, 1978 by the Thirty Third Legislature in its second regular session. The situation you describe arose and is controlled by The Open Meetings Law as it was prior to the 1978 Amendments.

Mr. Benjamin has advised us that the Finance Committee duly scheduled a meeting on April 24, 1978 to consider what action should be recommended to the full Board of Regents regarding tuition and fees for the coming 1978-79 school year. According to Mr. Benjamin that meeting was properly noticed in accordance with the Open Meetings Law; the documents which he has provided us with confirm this. Mr. Benjamin further indicates that following comments and discussion by members of the Committee, the Committee recessed at approximately 12:10 p.m., intending to reconvene at 2:30 p.m. that afternoon. During the time interval apparently seven members of the Board went to the office of the Honorable Frank Kelley, Speaker of the House of Representatives. We are informed that members of the press accompanied these Board members to the Speaker's office. Mr. Benjamin indicates to us, however, that the Speaker told the members of the press that this was not a meeting and that members of the Board were in his office at his invitation. Mr. Kelley then asked the members of the press to leave, which they did.

With respect to the substance of the conversation which took place in the Speaker's office, Mr. Benjamin states as follows:

The essence of the conversation with the Speaker was an effort by members of the Board to brief him on what had occurred during the morning session and on some of the problems which had been occasioned by the Legislature's proposed amendment. The Speaker along with Representatives West, Skelly and McLoughlin explained to the Board some of the problems which the Legislature had in connection with this year's session. There was no bargain reached nor deal suggested nor did the Speaker attempt to assure members of the Board that any proposed action which the Board took would be satisfactory to the Legislature.

We have been further advised by Mr. Benjamin that the Committee reconvened at 2:30 p.m. whereupon Regent Earl Carroll moved that the Committee recommend to the full Board an increase for the Fall Semester of \$100 per year for in-state students and \$460 per year for out-of-state students. After approximately 10 minutes of discussion the motion was passed. Regent Chandler then asked Regent Carroll to make the motion at the special meeting of the Board on May 5. The meeting was then adjourned.

The Board of Regents met again on May 5, 1978 at a duly noticed open public session to discuss, among other things, the tuition increases. All of the board members who were at the April 29 meeting also attended the May 5 session. In addition, Regent Warner, who was not present at the April 29 meeting attended the May 5 public hearing. Also present were student representatives of each of the three state universities and members of the press. The tuition increase proposal was the first matter discussed.

Regent Chandler, who conducted the meeting, remarked at the outset that he wanted to be flexible with the day's proceedings and allow all those individuals who wanted to address the issue of tuition increases to do so before the committee considered any part of the problem. The floor was opened to the audience whereupon nine persons, including the student body presidents of the three state universities, three students who said they represented students of the University of Arizona, two out-of-state-students, and an individual student from Arizona State University were allowed to present their position. With the exception of the individual student from ASU and one of the out-of-state students, each of the speakers was questioned by the board. In fact, five of the board members actively participated in the discussion asking questions or responding to the students' comments. During the discussion with ASU's student body president, Regent Chandler stated that the Board had tried to get some action taken on the issue at the previous month's meeting, but because of the importance of the matter to students, the committee had set the present open hearing.

Before moving on to the next item on the morning's agenda, Regent Chandler asked the representatives of the universities if they had further comments. There was no response. The proceedings described above, which began at 9:00 A.M., had lasted a little over two hours.

A special meeting of the Board of Regents convened at 12:30 P.M., immediately following the morning's open public session. Absent from this meeting were Regents Babbitt, Payne, and Warner, (the latter two had attended the morning session). Besides the board members, also present were representatives of the universities, members of the press, and visitors. During this meeting, Regent Carroll moved that the tuition be increased for non-residents to \$2100/yr. for U of A and ASU students and \$1860/yr. for NAU students, and increased for Arizona residents to \$550/yr. for U of A and ASU students and \$500/yr. for NAU students. To this motion, Regent Bilby proposed an amendment to delay the increase until January 1979. Debate among the committee members was held and the motion to amend was defeated by a vote of 4-3. Regent Carroll's motion for the tuition increase was passed by a vote of 5-2. The afternoon special meeting, which included two other questions besides the tuition increase issue, lasted for 25 minutes.

The principal issue to be resolved is whether on April 29 the seven members of the Finance Committee--at their meeting in Representative Kelley's Office--took any "legal action" as that term has been defined by our prior opinions. With respect to the types of discussions and deliberations of governing bodies which are required under the Open Meetings Law to be conducted at public meetings, we have previously held in Atty.Gen.Op. 75-8 that:

Not all "discussions, considerations and consultations", however, are required to be done in an open meeting. The definition of "legal action" contemplates actions by "a majority of the members of a governing body." Accordingly, it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body, constitute "legal action" and must be conducted in an open meeting, unless an executive session is authorized. . . .

The Finance Committee is comprised of eight members. Accordingly, a meeting of seven members of the Committee at which discussions, deliberations, considerations or consultations regarding matters which might foreseeably require final action or final decision by the Committee or the Board to which it makes its recommendations constitutes "a legal action". Therefore such discussions must be conducted in accordance with the Open Meetings Law. It appears from Mr. Benjamin's description of the meeting in Speaker Kelley's office that the seven members of the Finance Committee attending that meeting may well have engaged in such discussion, deliberations, considerations and consultations. The members of the Committee attending that meeting apparently discussed proposed tuition fee increases, which was a matter presently being considered by the Committee for final action (i.e., a final recommendation to the Board of Regents). The fact that there "was no bargain reached nor deal suggested" does not remove the conclave from the purview of the Open Meetings Law. The purpose of the Open Meetings Law is to insure that the deliberations and proceedings of State governing bodies and their committees and subcommittees are conducted openly. It has long been accepted that the Open Meetings Law does not require that just the final vote be conducted in an open meeting. As the California Court of Appeals stated in the case of Sacramento Newspaper Guild v. Sacramento Board of Supervisors, 69 Cal.Rptr. 480, 487 (App. 1968):

An informal conference or caucus permits crystalization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate those evasive devices.

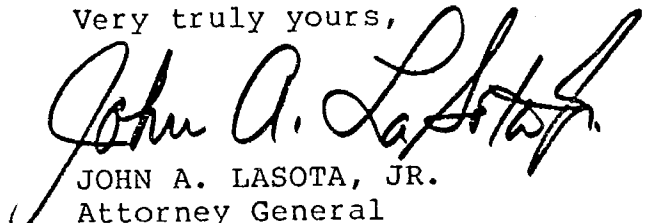
Based on the information provided by Mr. Benjamin, the Committee may have met on April 29 in violation of the Open Meetings Law. However, a definitive determination can be made only by a court. Even if we had the authority to make a binding legal determination that the Open Meetings Law had been violated, it is our opinion that this would not mean the tuition increases recommended by the Committee, and approved by the Regents on May 5, 1978, are null and void.

A.R.S. § 38-431.05 provides: "All business transacted in any body during a meeting or public proceedings held in violation of the provisions of this article shall be null and void." According to Mr. Benjamin, no formal or informal vote was taken by the Finance Committee at the meeting with Speaker Kelley. The Committee reported to the Speaker on what transpired at the morning session. The "report" then would be the business transacted or transpired at the meeting. Thus if literally construed, § 38-431.05 would render the "report" null and void. This, however, does not in our opinion taint the business conducted by the Committee in open session on April 29 and render it null and void. The minutes of the Finance Committee's meeting evidences that the prospect and effects of a tuition increase were discussed at length. The meeting convened at 9:05 and recessed at 12:10. During this period the Committee heard from State representatives, university presidents, various faculty members, department chairpersons and student representatives. Additionally, the regents discussed their views and position on a tuition increase. The vote to recommend to the Board of Regents that tuition be increased was taken at the open afternoon session.

Consequently, we do not construe § 38-431.05 so broadly as to declare null and void the business conducted by the Committee at the properly noticed open sessions.²

Even if the recommendation by the Finance Committee to the Board of Regents to increase tuition is declared a nullity because it was based on actions in violation of the Open Meetings Law, this would have no effect upon the board's passage of the increases. This is because the final decision, rendered at the afternoon session of the May 5 meeting, was not based on the April 29 recommendation, but rather on the input presented at the morning's open public hearing. At this duly noticed special meeting, there was a lengthy open forum where student representatives and board members exchanged their views on the proposal. When the motion was formally introduced at the afternoon session, there was again deliberation and debate before it was voted upon. It would appear that the Board's action in approving a tuition increase was taken with due deliberation and with an opportunity for all parties to contribute their viewpoints, in compliance with Arizona's Open Meeting Law. The validity of the tuition increase should therefore be sustained.

Very truly yours,


JOHN A. LASOTA, JR.
Attorney General

² We recognize that courts from other jurisdictions are split on this issue. Compare, Town of Palm Beach v. Gradison, 296 So.2d 43 (Fla. 1974) (holding that a violation of the "sunshine law" will render all subsequent action null and void) with Perez v. Pawtucket Redevelopment Agency, 302 A.2d 785 (R.I. 1973) (allowing violations of Open Meetings Laws to be cured by subsequent public transactions). We approve the approach expressed in Bagby v. School District No. 1 Denver, 528 P.2d 1299 (Colo. 1974) which requires that questions concerning the requirements of the Open Meetings Law be resolved on a case-by-case basis in accordance with the peculiar set of facts presented. In concluding that sufficient public participation and inquiry took place when the Board of Regents, upon recommendation of the Finance Committee, raised the tuition rates so as to prevent a "star chamber" decision, we note also that any violation occurring was obviously unintentional since the committee members attended the "meeting" as guests in Speaker Kelley's office without design to remove themselves from the public eye.